

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

FEB 23 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

BILLIE GENE CUMMINGS,

Appellant.

2 CA-CR 2005-0372

DEPARTMENT A

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20042518

Honorable Michael J. Cruikshank, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Diane Leigh Hunt

Tucson
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Rose Weston

Tucson
Attorneys for Appellant

PELANDER, Chief Judge.

¶1 Billie Cummings was convicted after a jury trial of kidnapping and sexual assault. The trial court found Cummings had an historical prior felony conviction and

sentenced him to concurrent, presumptive prison terms of 9.25 years and 10.5 years. In the sole issue raised on appeal, Cummings contends the trial court erred in denying his motion for mistrial, claiming the denial violated his right to confrontation. We find no merit to the issue and affirm.

¶2 During the state's direct examination of the victim, the prosecutor asked about some of her responses to a police officer's questions on the night the offenses were committed. The officer's interview of the victim had been tape-recorded and transcribed, and the prosecutor directed the victim to a few of her answers in the transcript. The victim responded several times that she did not remember the answers she had given the officer, even after reading them in the transcript. For the remainder of her direct examination, she testified from memory about the events.

¶3 Defense counsel began his cross-examination of the victim without mentioning the transcript of her interview with the police officer. After the lunch recess, counsel began questioning her on when her memory failure about the incident had begun. He then asked her about a specific statement in the transcript, and the prosecutor asked for a page reference. Defense counsel responded that he did not need one because the victim had answered affirmatively. After further questions and answers, the prosecutor objected to counsel's asking a question without citing a specific page in the transcript. The trial court sustained the objection.

¶4 In the ensuing bench conference, the court told defense counsel that the question about the victim's statement in the transcript had no context absent a page reference. Counsel then showed the victim a transcript that had been marked as Defense Exhibit H and told her it was similar to the transcript the prosecutor had showed her. Citing page and line numbers in the exhibit, defense counsel asked the victim if she remembered the answer she had given in the interview. The prosecutor stopped him, saying she had never seen the transcript.

¶5 The prosecutor then requested another bench conference and asserted the transcript was of an interview of the victim by defense counsel, which counsel denied, stating it was a transcript of the victim's interview with the police officer. The prosecutor replied that the page numbers were different from the state's transcript and asked if counsel could use that one, the court asked him if he could "transfer over the numbers and pages," and counsel responded that he could.

¶6 The bench conference then concluded, and defense counsel resumed his cross-examination of the victim but asked her only three questions about one answer in the transcript during the remainder of his cross-examination. Defense counsel finally moved for mistrial, but only after the prosecutor completed her redirect examination of the victim; the court asked the victim jurors' questions; another witness answered questions on direct examination, cross-examination and from jurors; the afternoon recess was taken; and the prosecutor talked about recalling the previous witness. But defense counsel made the

motion only after first asking the court to state the rule of evidence that prohibited him from using his own transcript to cross-examine the victim. And, before he asked that question, counsel acknowledged, “I know it’s late, but I’d like to do it anyway.”

¶7 In response to counsel’s question about the evidence rule, the court asked if he had had his own transcript made, learned he had, and asked if the page numbers in it were different from the state’s transcript. Counsel replied that the state’s transcript contained a number of statements deemed to be inaudible but said his transcriber had been able to understand and transcribe those statements. For the first time, counsel complained that he had been unable to conduct his prepared cross-examination of the victim because of the prosecutor’s objection to his using his own transcript. And, for the first time, counsel asserted Cummings’s right to confrontation had been violated and moved for a mistrial. But he did not ask to recall the victim to testify on cross-examination. The court denied the motion and offered suggestions to address the problem, stating:

I understand your issue now. At the time this occurred it appeared to me there was a dispute or an uncertainty about why the same words were on different pages and different lines of two separate transcripts, and for the sake of consistency I want you to use one transcript so that both of you are looking at the same page and the same line for the words that that witness is looking at. That’s important.

¶8 On appeal, Cummings argues the trial court’s precluding his attorney from using his own transcript to cross-examine the victim violated his right to confrontation and prevented him from adequately cross-examining her the way he had prepared to. The state

contends defense counsel invited the error by failing to object when the trial court directed him to use the state's transcript. We disagree. The invited error doctrine prohibits a defendant from deliberately injecting error into the record and then attempting to profit from it on appeal by claiming the error was fundamental. *See State v. Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d 631, 632 (2001); *State v. Diaz*, 168 Ariz. 363, 366, 813 P.2d 728, 731 (1991). And it applies primarily to a defendant who requests a jury instruction at trial but complains on appeal that giving the instruction was error. *See Logan*, 200 Ariz. 564, ¶ 8, 30 P.3d at 632 (“[W]hen a party requests an erroneous instruction, any resulting error is invited and the party waives his right to challenge the instruction on appeal.”). Here, the trial court's request that defense counsel use his own transcript was the eventual result of an objection by the prosecutor, not defense counsel's deliberate injection of error into the trial.

¶9 We nevertheless find no abuse of discretion in the trial court's denial of the motion for mistrial. *See State v. Herrera*, 203 Ariz. 131, ¶ 3, 51 P.3d 353, 356 (App. 2002) (ruling on mistrial motion reviewed for abuse of discretion). “A declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.” *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). By failing to tell the court that he wanted to use a different transcript and why until long after he had finished cross-examining the victim, Cummings was unable to show justice would be thwarted unless a mistrial were granted. The record clearly shows the trial court was unaware of the conflict

until Cummings moved for a mistrial. And, once it was aware, the court attempted to assist Cummings by suggesting he seek admission of the tape of the interview and tell the jury to listen to it.

¶10 Moreover, when the court asked defense counsel whether there were material differences between the two transcripts, counsel pointed out only one. We note in addition that counsel's cross-examination of the victim and her sister highlighted discrepancies in the victim's testimony even without using the defense transcript. No violation of Cummings's confrontation rights occurred.

¶11 Cummings's convictions and sentences are affirmed.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

GARYE L. VÁSQUEZ, Judge